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AUTOMOTIVE MACHINISTS LODGE 1173

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FAIRFIELD IMPORTS, LLC d/b/a FAIRFIELD TOYOTA, MOMENTUM AUTOGROUP and MOMENTUM TOYOTA OF FAIRFIELD, Plaintiff, And AUTOMOTIVE MACHINISTS LOCAL LODGE NO. 1173, DISTRICT LODGE 190, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO Defendant.	Case No.: 20-CA-035259; 20-CA-070368; 20-CA-088332; 20-CA-106248 **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

In this Brief we shall address the limited Exceptions submitted by the Charging Party. While the Charging Party agrees in large part with the findings of the Administrative Law Judge, there are certain findings and remedies that are erroneous or inadequate. We address those issues below.

II. THE BOARD SHOULD OVERRULE *LUTHERAN HERITAGE VILLAGE LIVONIA*

The Charging Party submits that the Board should return to the rule established in *Lafayette Park Hotel***,** 326 NLRB 824 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine to determine when employer maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*. *See also, Ark Las Vegas Rest. Corp*., 343 NLRB 1281, 1283 (2004) (any ambiguity in a rule that restricts concerted activity can be construed against the employer).

The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity allows Respondents to chill the Section 7 rights of those others who reasonably read the rule as reaching Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest in such activity. They may assert their right to "refrain from such activity." But those who choose to engage in such activity have their conduct chilled, if not prohibited. The Board's rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity.

In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

> Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could be conceivably be

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> read to cover Section 7 activity, even though that reading is unreasonable. We decline to take that approach.

Lutheran Heritage Village-Livonia, 343 NLRB at 647.

This doctrine has created confusion and uncertainty in the application of rules. Moreover, it is an illogical statement. If the "rule could be interpreted that way [to prohibit section 7 activity]," the rule should be unlawful. We are not suggesting that if that "reading is unreasonable," it should be found to violate the Act. Only if the rule can be reasonably read to interfere with Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity, it should be unlawful.

The Board's prior rule in *Lafayette Park Hotel*, is to construe any ambiguity against the employer. This has been the consistent application in many areas of law, including the Board's application of employer-created rules. After all, the employer has control over what it says, and it can implement language that is not vague or ambiguous. Only the employer benefits from chilling and restricting Section 7 activity.

A worker is not at fault if the employer makes a statement that is ambiguous and could affect or chill Section 7 rights. The employer statement should be construed against the employer. Where there is any reasonable interpretation of the rule that could interfere with Section 7 activity, the rule should be deemed unlawful.

The *Lutheran Heritage Village-Livonia* rule has become one by which the Board ignores the illegal yet reasonable interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has turned the law on its head; where there is a reasonable interpretation that the rule does not affect Section 7 rights, which a few employees may apply, it makes no difference that most or many of the employees would apply a reasonable interpretation that the rule prohibits Section 7 activity.

The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of employer rules to be imposed from the employer perspective rather than from the view of a worker. Where the worker could read any reasonable interpretation into the rule that would

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prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that some workers might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact that at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus the rule would chill those activities.

We quote at length the dissent, and we will ask this Board to return to the view of the dissent:

> In *Lafayette Park Hotel*, supra at 825, the Board recognized that determining the lawfulness of an employer's work rules requires balancing competing interests. The Board thus relied upon the Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825. While purporting to apply the Board's test in *Lafayette Park Hotel*, the majority loses sight of this fundamental precept. Ignoring the employees' side of the balance, the majority concludes that the rules challenged here are lawful solely because it finds that they are clearly intended to maintain order in the workplace and avoid employer liability. The majority's incomplete analysis belies the objective nature of the appropriate inquiry: "whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."
>
> Our colleagues properly acknowledge that even if a "rule does not explicitly restrict activity protected by Section 7," it will still violate Section 8(a)(1) if—among other, alternative possibilities—"employees would reasonably construe the language to prohibit Section 7 activity." On this point, of course, the established test does not require that the only reasonable interpretation of the rule is that it prohibits Section 7 activity. To the extent that the majority implies otherwise, it errs. Such an approach would permit Section 7 rights to be chilled, as long as an employer's rule could reasonably be read as lawful. This is not how the Board applies Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) ("The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").
>
> The majority asserts that it has considered the employees' side of the balance, in that it has found that the purpose behind the Respondent's rules—to maintain order and protect itself from liability—is so clear that it will be apparent to employees and thus could not reasonably be misunderstood as interfering with Section 7 activity. Although the Respondent's assertedly pure motive in creating such rules may be crystal clear to our colleagues, it may not be as obvious to the Respondent's employees, especially in light of the other unlawful rules maintained by the Respondent. Rather, for reasons explained below, we find that the challenged rules are

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> facially ambiguous. The Board construes such ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978)

Id. at 650 (footnote omitted).

III. THE ARBITRATION AGREEMENT IS INVALID

The Charging Party supports the findings of the Administrative Law Judge that the Arbitration Agreement is unlawful under *D.R. Horton*, 357 NLRB No. 184 (2012).

There are, however, additional reasons why it is unlawful.

First, in light of the recent decision of the California Supreme Court, the Arbitration Agreement is invalid because it does not permit representative actions, only individual claims. In *Iskanian v. CLS Transportation*, No. S204032 (Cal. June 23, 2014), the California Supreme Court interpreted Labor Code Section 2698, et seq., known as the Private Attorney General Act of 2004, as being not subject to a waiver. Although the Court in the same case did not adopt the reasoning of the Board in *D.R. Horton* to invalidate that agreement, the Court held that, under state law, an arbitration or employment agreement could not waive the right of employees to bring representative actions under that statute. It analyzed the Federal Arbitration Act and held that it could not be applied to waive those rights. Here, the Arbitration Agreement would waive the right to engage in the representative action as one form of collective action. Whether *D.R. Horton* survives to prohibit the waiver of a different type of collective action does not affect the proposition that now the Arbitration Agreement is invalid under *Iskanian*.

It is also invalid because it would prohibit bringing a claim with another employee to the California Labor Commissioner. *See Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013) (holding that the FAA does not preempt all claims before the Labor Commissioner).

The Arbitration Agreement is overbroad for another reason, which was not directly addressed by the ALJ. It is a one way limitation on class or collective actions. It does not prohibit the employer from bringing an action against more than one employee arising out of the same issue in the workplace. Thus, the employer could bring an action naming several employees as defendants whereas the employees would be prohibited from bringing their own action on a collective basis. They would be prohibited from bring counter or cross claims in response. Thus,

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the agreement lacks mutuality and gives the employer substantial leverage in bringing an action against several employees. This violates section 8(a)(1) on two grounds: It prohibits collective action by employees against the employer. The arbitration agreement also interferes with employee rights to refrain from collective action because the employees would be forced to act collectively where they are named as multiple defendants in an action over the same issues affecting wages, hours and working conditions.

Although we recognize that employer claims against employees are not commonplace, an employer, for example, could bring a claim for overpayment of wages or claim against employees for disclosing confidential information subject to the confidentiality agreement. In those cases, the employer would have the advantage of bringing one action against multiple employees whereas the employees could not act together to bring actions against the employer, even over the same issue. For example, if the employer claimed that the employees were overpaid and owed the employer money, the employer could bring an action against them and name multiple employees in the same lawsuit. The employees, on the other hand, couldn't bring a lawsuit against the employer in a collective action seeking unpaid wages or seeking indemnification from the employer's claim. Cal. Lab. Code § 2802.

The Arbitration Agreement would prohibit group claims in the form of whistle blowing under the Federal False Claims Act. These claims cannot be waived, and this would effectively prohibit such actions.

The Arbitration Agreement is illusory because the At Will Employment Agreement, which is attached (Ex 21A), allows the employer to change or withdraw any term and condition of employment "at Company's unrestricted option at any time, with or without good cause." As a result, the employer could withdraw from arbitration at any time.

The Arbitration Agreement is also overbroad and unlawful because it applies, not only to the employer, but to others who are not bound to it (owners, directors, officers, managers, etc.). Thus, it is not mutual. Furthermore, it includes other employers - employee benefit and health plans (and parties affiliated with them) - who are not parties to the Arbitration Agreement.

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The ALJ's remedy as to the Arbitration Agreement is inadequate. Because the employees have been prohibited from filing class actions or any other form of collective actions, the employer should allow each employee to file any class or collective actions, and any claims subject to that action must be tolled. Absent that remedy, the employer would have unlawfully prohibited employees from filing such class or collective actions for at least the 10(b) period from when the charge was filed. Furthermore, absent the tolling of the statute of limitations, the filing of any such claim, now or in the future, upon the issuance of a Board remedy would be effectively useless since the statute of limitations would have expired.

Additionally, if there are any employees who filed any such claims and the employer has moved to dismiss them or to compel arbitration, such motion should be rescinded by the employer. The Board should direct such rescission as a part of a normal and appropriate remedy in these cases.

IV. THE APPLICATION OF THE FEDERAL ARBITRATION ACT TO DISPUTE RESOLUTION PROCEDURES IS NOT AUTHORIZED BY THE COMMERCE CLAUSE

The FAA, 9 U.S.C. §§ 1, *et seq.*, does not preempt the National Labor Relations Act, and, in the context of this issue, it simply does not apply. A prerequisite to application of federal law is federal jurisdiction. In the case of the FAA, federal jurisdiction is allegedly provided by interstate commerce business of the employer and thus is subject to be regulated under the Commerce Clause. Because the FAA is based on Commerce Clause jurisprudence, there is now a substantial question about whether the FAA, as applied to the circumstances of this case, is constitutional. The Supreme Court's recent decision in *National Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566 (2012), substantially changes the analysis.

In *Sebelius*, the Supreme Court considered the authority of Congress to enact the so-called individual mandate, which requires citizens to purchase and maintain healthcare insurance. The individual mandate was an essential part of healthcare reform. The majority of the Court defined the activity at issue as the purchase of healthcare insurance. The majority opinion, authored by Chief Justice Roberts, found that there was no commercial activity subject to regulation under the Commerce Clause; instead it was a matter of non-activity, i.e., individuals choosing not to

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purchase insurance. The *Sebelius* court found that Congress could not regulate this non-activity, i.e., the failure to purchase health insurance, under the Commerce Clause because there was no pre-existing economic activity. *Sebelius*, 132 S.Ct. at 2590-2591.

The same analysis is equally applicable here. Although the activity of Fairfield Toyota itself may affect commerce—which the Union does not dispute—the manner of resolution of a dispute between Fairfield Toyota and its employees—whether in court or in arbitration—does not have any impact on any issue of commerce. Private arbitration agreements with employees who do not perform work across state lines, do not transport goods across state lines, and are not seeking to enforce anything more than state laws, do not come under the broad umbrella of the Commerce Clause. The Commerce Clause can only regulate classes of activities; it may not be used to regulate "classes of individuals, apart from any activity in which they are engaged." *Sebelius*, 132 S.Ct. at 2591. Because the application of the FAA depends on the Commerce Clause, and because there is no substantial effect on interstate commerce by the forum in which this employment dispute is resolved, the FAA cannot be used to prohibit or interfere with protected concerted activity under the National Labor Relations Act.

We, of course, agree that the dealership itself is engaged in interstate commerce. Indeed, the Fair Labor Standards Act, Title VII of the Civil Rights Act and much other federal legislation apply to this dealership because those Acts regulate the commercial aspect of the dealership. The activity at issue here is not health and safety (OSHA), wages (Fair Labor Standards Act) or any other aspect of the regulation of commerce by the federal government.

The Federal Arbitration Act does not purport to regulate anything except the narrow aspect of dispute resolution. Applying the apparent rationale of commerce clause application, even if the Employer's business did not affect interstate commerce (such as being two employees), if there was an arbitration agreement, it would be governed by the Federal Arbitration Act because the activity of dispute resolution is subject to Commerce Clause regulation.

The courts have attempted to address this issue. The courts in *Stampolis v. Provident Auto Leasing Co.*, 586 F.Supp.2d 88 (E.D.N.Y. 2008), and *City of New York v. Beretta*, 524 F.3d 384

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(2nd Cir. 2008), recognized that litigation is different from the activity of the entity involved in the litigation. That is the critical distinction that the Administrative Law Judge ignored and that the Board must face.

We recognize that the National Labor Relations Act extends to this Employer. So does the Fair Labor Standards Act, the Occupational Safety and Health Act and many other examples of federal regulation. But that is because each of those statutes regulates a broad or a narrow scope of activity affecting commerce. The FAA does not regulate the same kind of commercial activity.

In *United States v. Lopez*, 514 U.S. 549 (1995), the Court struck down the Gun Free School Zones Act, which prohibited individuals from possessing firearms in school zones. It did so because it found that the possession of guns was not an economic activity. This is a narrow and important reading of what activity is to be analyzed for purposes of determining Commerce Clause authority. *See also*, *Gonzales v. Raich*, 545 U.S. 1 (2005).

The fundamental problem is that the Federal Arbitration Act does not regulate auto dealers, the automobile industry, employment or any other commercial activity. It simply regulates dispute resolution. That activity itself does not affect interstate commerce.

The result here is anomalous. It means that a small employer, whose business does not affect commerce, will nonetheless be governed by the FAA if it imposes or uses arbitration. It means that a claim by one worker for a small wage claim based on a contract with an employer who claims it has no impact on commerce will be subject to regulation by the FAA.

In summary, the Board may regulate the business of this auto dealership. No one disputes that. The Federal Arbitration Act, however, is not authorized to focus upon the specific activity of dispute resolution in the form of arbitration because that activity does not fall within the Commerce Clause.

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V. THE CONFIDENTIALITY AGREEMENT IS OVERBROAD BECAUSE IT PROHIBITS THE DISCLOSURE OF INFORMATION NECESSARY FOR REPRESENTATION, COLLECTIVE BARGAINING AND FOR LAWFUL PROTECTED CONCERTED ACTIVITY INCLUDING BOYCOTTING STRIKING AND PUBLICITY

The Administration Law Judge held that the confidentiality agreement was overbroad because it prohibits employees "from discussing wages or other terms and conditions of employment with non-employees, such as union representatives." ALJD p. 6:34-35. In addition to union representatives, this language prohibits employees from discussing these wages with employees of other employers.

More importantly for purposes of the exceptions, this provision would also prohibit the disclosure of "any documents generated by the Employer." This is overbroad because it would extend to payroll records, work schedules, the employee handbook or any other document that related to or contained any information about work. Thus, the ALJ's finding that the document would prohibit employees from discussing "wages or other terms and conditions of employment" is not broad enough because the confidentiality agreement would also prohibit disclosure of documents.

This illustrates the necessity of returning to *Lafayette Park Hotel*. Some employees would reasonably construe this to include documents that concern wages, hours and working conditions. The employer created the overbreadth and ambiguity. Such ambiguity should be construed against the employer that created the overbreadth.

The confidentiality agreement prohibits the disclosure of such information as sales information and "future and proposed … sales which are planned, under consideration or in production of process." This is critical information that an employee should be able to disclose to other employees or to a union for purposes of such activity as lawful boycotting and lawful strike or for bargaining purposes. For example, in the course of bargaining, it is critical that the union know sales information because that will impact the work of mechanics with respect to getting new cars ready. It is important to determine the amount of work on an ongoing basis. The financial stability of the company and ability to respond to Union economic bargaining demands depend upon sales. This language would completely prevent the union from effectively

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representing employees if the employees cannot disclose the basic information that relates to bargaining, representation and, ultimately, lawful economic activity.

Product specifications are also covered by the confidentiality agreement. This critical information is necessary for purposes of determining whether mechanics have properly repaired vehicles.

Customer names and addresses would be relevant for a number of purposes. Customer names and addresses would be relevant, for example, if there were a customer complaint in order for the Union to contact the customer to determine the nature of the complaint and whether the employee was at fault. *See Stephens Media*, 359 NLRB No. 39 (2012), and *Piedmont Gardens*, 359 NLRB No. 46 (2012). The Union would also be entitled to the customer names and addresses of the employees if they wanted to engage in lawful boycotting of those customers. Additionally, if an employee thought that a customer had particular information about the employer relevant to any protected concerted boycotting activity or lawful pressure campaign, then this provision would prohibit the employee from disclosing that information to the union.

It is clear that there is a substantial amount of information that would be relevant to representational activities by the union that could not be disclosed by the employees. The ALJ focused only on wages. The Administrative Law Judge ignored the overbreadth of this confidentiality agreement.

We emphasize here that this confidentiality language is not restricted to such categories as proprietary or trade secret information. If the company had limited its non-disclosure to proprietary or trade secret information, it would be a different issue. The handbook language is much broader because it effectively limits the disclosure of any information about the business that would be necessary and relevant for union purposes as described above.

Here, these restrictions are particularly onerous in the context of bargaining. Where the Union has the right to bargain over the impact of many business decisions, this language would prohibit the disclosure of the business decisions, both before they were made and after they were made to the union, even for the purpose that the union could demand bargaining. Effectively, this creates a forced waiver because the employees would not be able to disclose the information even

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though they knew it, and then when the union eventually discovered the information through some other means, the employer would argue that the union waived the right to bargain over the decision.

In summary, then, the Board needs to face the question of whether such restrictions, which are not narrowly tailored by, for example, limiting the confidentiality to proprietary or trade secret information, are overbroad for the reasons explained above.

VI. THE ALJ FAILED TO FIND THAT BY IMPLEMENTING THE ALTERNATIVE WORK WEEK, THE EMPLOYER WAS NECESSARILY COMMUNICATING IN DIRECT DEALING WITH EMPLOYEES.

The ALJ recommended dismissal of the direct dealing allegation concerning the alternative work week election. This is erroneous.

The alternative work week election requires that the employer communicate its proposal to the employees and hold a meeting to discuss the proposed change. That discussion is required by state law. *See* IWC Order 4, Section 3(C) (describing election procedures, including requirement for meetings with employees). Thus, necessarily, there was direct dealing because of the requirement under state law. *See also* Tr. 185-187.

The ALJ also failed to adopt an appropriate remedy. The ALJ directed that the Respondent should rescind the unilateral changes made in its employees terms and conditions … including … unilaterally changing technicians work schedules." *See* ALJD p. 37:40-38:7. The problem in this remedy is that it does not specifically require that the employer rescind the change in the work schedules back to the 4 day week, 10 hour schedule, which existed in December of 2010. The employer must, upon a request by the Union, return the employees to the 4 day week, 10 hour a day schedule that had existed between September 2010 and December 2010. *See* ALJD p. 21:22-27.

Furthermore, the employer should be required to make the employees whole for any losses suffered because of the change in the schedule. This would include the payment of any overtime they would have received and the payment of the additional costs in returning to work on 5 days as opposed to 4 days. Each fifth day worked under the illegally implemented

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5 day/8 hour schedule must be paid at overtime since the employees should have been working only a 4 day/10 hours schedule.

There is an obvious additional commuting expense and potentially other expenses, such as additional child care caused by the change in the schedule. The employees should be reimbursed any such costs.

VII. THE CHANGE IN THE TIRE POLICY WAS A UNILATERAL CHANGE.

The ALJ recognized that the prior used tire and used parts policy allowed employees to take them home. *See* ALJD p. 24:22-25:25. The ALJ also found that when the supervisor, Mr. Corona allowed Mr. Bartolomucci to take home tires, he had been consistent in allowing employees to do so, and, as far as the evidence reflected, that had been the employer's consistent pattern. The ALJ, however, erroneously held that, because the policy allowed discretion, there was no change in policy because of subsequent decisions to apply that discretion.

What the ALJ ignores is consistent Board law that, where the employer has a relaxed policy and then changes that policy, by tightening it up or otherwise altering that policy, the change is a unilateral change even though the policy, on its face, granted that discretion. Here, the employer effectively eliminated the policy of allowing employees to take used tires and parts home, thus effectively changing the policy. Had the employer been exercising discretion to deny such requests, the case would be different. But the employer had never exercised such discretion.

As a remedy for this violation, the employees should be allowed to take home as many used parts and tires as they want for the period during which the violation occurred until it is actually remedied. Furthermore, the employer should not be allowed to exercise any discretion to prohibit employees from taking these items home because otherwise it will do so and thus not afford a complete remedy. Additionally, employees who have left the dealership should be allowed to take home such parts for the period of time during which the unlawful policy was tightened from when they left the dealership. The employees should be allowed to return to the dealership for those purposes to remedy the violation for them for that period described above.

This remedy isn't theft. It is simply allowing the employees to take home what they originally been able to take home until the employer unilaterally changed the policy.

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VIII. THE ALJ FAILED TO AFFORD A COMPLETE REMEDY FOR THE DISCHARGE OF MR. BARTOLOMUCCI

The ALJ properly found that the Respondent did not bargain over the decision to terminate Mr. Bartolomucci. However, the only effective remedy under these circumstances is to direct that he be returned to work with full back pay pending the negotiation of the decision to terminate him. The normal remedy for the failure of an employer to bargain over a decision is to restore the status quo ante and then allow the parties to bargain over the decision before it is implemented. The same result should apply with respect to the termination of Mr. Bartolomucci.

IX. THE ALJ PROPERLY FOUND THAT THE EMPLOYER UNLAWFULLY INCREASED WAGES. THE REMEDY HOWEVER IS INADEQUATE.

The ALJ correctly found that increased wages were provided to employees without bargaining with the Union. ALJD p. 22:17-23:13. These wage increases were granted to two employees. Had the employer not granted those wage increases, the Union could have bargained wage increases for other employees or bargained the use of that money for other purposes affecting wages, hours and working conditions of the other employees.

In order to allow a complete remedy, the employer should be directed to put aside an amount equivalent to those increased wages and allow the Union, in its discretion, to determine where the money should be used. Absent any such remedy, the employer gets the advantage of having given the wage increases without bargaining, and there is no effective remedy for the rest of the employees.

Additionally, it would not be an effective remedy to require the employer to bargain over how that money would be distributed. Having already distributed the money to employees as wage increases, the employer would have no incentive at all to agree to pay additional money to other employees in bargaining. It would be useless bargaining.

In summary, under these circumstances, the only remedy meaningful where the employer pays increased wages is to allow the Union to take that amount of money and, in its discretion, distribute it to other employees.

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X. REMEDIAL ISSUES

There are a number of remedial issues.

A. The ALJ directed the reading of the notice.

Here, however, where there is a Union that represents the employees, it derogates its represented capacity not to allow the Union Representative to be present when any such notice is read. They should be present.

B. The Notice should be read at least 5 times.

Because of the substantial delay and the substantial misconduct of this employer, one reading is not adequate. The notice should be read 5 times. A reading is an effective way of communicating. Only when wrongdoers are forced to swallow some crow will the Board's remedy be an effective deterrent. Otherwise, the responsible individuals will hide behind others who will be forced to accept responsibility. Here, this should be placed on the owner whose dealership committed the violations and contributed to those violations in a workplace.

C. When the notice is read, the employees should be paid for their time.

Here, because the mechanics are on a flat rate system, they actually lose wages for any notice reading. They need to be paid at their full rate, ascertained by the average amount they have earned per hour on the flat rate so as to avoid any disincentive to attend the reading.

D. The certification period should be extended for more than a year.

There is no legal reason why the Board can't extend the certification for more than a year and that should be the normal remedy in these circumstances.

E. A set Schedule Should be Set for Bargaining

The Board should require that a set schedule be required for bargaining and that employee negotiators and union negotiators be made whole for any loss of earnings or for the expenses incurred by the union negotiators.

F. Notice Provision.

The ALJ recommended that the Respondent not make any reference to the termination of Mr. Bartolomucci to certain specified persons. *See* ALJD p. 32-38. The words "to any person" should be inserted because that group is missing.

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G. 60 days is too short for notice posting.

The Board should as a normal remedy determine that a Notice should be posted for the length of time from when the unfair labor practices were committed until the Notice was actually posted. A 60-day notice period only encourages delay, and the notice is largely ineffective years down the road after many employees have left the facility. Such a limited posting period only encourages delay. The Board, as a normal remedy (not an extraordinary remedy, but a remedy that is presumed necessary in every case), should require that Notices be posted for the length of time between when the unfair labor practice is committed, or when the complaint issues, until the notices are actually posted. This will provide a lengthier posting period and will discourage delay. Most notices in the workplace are posted on a permanent basis. That is not necessary here at this time, but a longer period will serve the purpose of actual notice to a sufficient number of workers and act as further deterrence.

H. The notice should be posted on the internet site maintained by the company, which is available to the public.

To the extent the employer maintains an internet site available to the public the notice should be posted.

I. The Board Should Require That The Decision And Notice Be Provided To Each Employee In The Bargaining Unit.

Although the Board now requires that there be a link to the Board Decision, in this case the Board should order that the employer provide copies of the Board decision to each employee working in the facility and additionally to mail it to each employee who has worked in the facility during he period of time when the unfair labor practices were committed.

J. The "Choose Not Engage" Language Should Be Deleted

The notice inappropriately contains the "choose not to engage in any of these protected activities" language. Since there was no allegation of such misconduct in this case, that language is irrelevant.

K. The Notice Should Contain An Affirmative Statement Of The Misconduct

The notice is inadequate because it does not contain an affirmative description of the employer's misconduct.

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The Notice doesn't have such language as follows:

> We have been found to have unlawfully terminated our employee Frank Bartolomucci. We have been found also to have maintained unlawful rules, unlawfully changed conditions of employment without bargaining with the Union … etc.

The Board should fashion such affirmative statements so that employers or unions which are respondents affirmatively admit to the employees that they have violated the Act. The "we will not…" language may be useful for purposes of injunctive relief, but it doesn't adequately describe to employees the misconduct of the Respondent.

We recognize that Respondents are reluctant to post notices where they have to admit where they did something wrong. That is precisely why the Board needs to force respondents to put that language in the Notices. They must acknowledge their wrongdoing, not simply promise not to do something in the future. A promise not to do something in the future is not an admission that there was any past misconduct.

L. The Employer Should Be Required To Post, For 10 Years, The Board's Proposed Employer Notice

The Board's employer notice was rejected, and the Board has abandoned, for the moment, such an effort at rule making. But the Board has the power to require that notice be posted by wrongdoers. The notice should be posted for 10 years.

XI. CONCLUSION

For the reasons suggested above, the Exceptions should be granted.

Dated: July 1, 2014

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/S/ David A. Rosenfeld
By: DAVID A. ROSENFELD
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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the withing action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501. I certify that on July 1, 2014, the **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** document was served on the following parties as addressed below via E-Filing, E-Mail and U.S. Mail:

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I certify under penaly of perjury that the above is true and correct.

Executed at Alameda, California, on July 1, 2014.

/s/ J. L. Aranda
J. L. ARANDA

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